

**Public Bank Bhd v National Feedlot Corp Sdn Bhd & Ors and
another appeal**

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL
NOS 02(f)-14-05 OF 2024(W) AND 02(f)-15-05 OF 2024(W)
HASNAH HASHIM CJ (MALAYA), ABDUL RAHMAN SEBLI CJ
(SABAH AND SARAWAK) AND ABU BAKAR JAIS FCJ
1 JULY 2025

Banking — Secrecy — Bank customer — Customers sued bank for divulging their confidential banking information to unauthorised third party who in turn made the information public — Bank argued that it should not be held liable as the disclosure to third party was made by two of its ‘rogue’ staff who had acted outside the scope of their authority — Whether such argument could not prevail against ss 97(1) and (2) and and s 99(1) of Banking and Financial Institutions Act 1989 (‘the BAFIA’) which, read together, held bank liable — Whether since issue of breach of banking secrecy/confidentiality was already governed in Malaysia by statute (‘the BAFIA’) common law authorities on the point that existed before the Civil Law Act 1956 came into effect were irrelevant in determining the bank’s liability

The respondents in the first appeal herein had sued Public Bank Bhd (‘PBB’) in the High Court for wrongfully disclosing confidential information about their business with the bank to an unauthorised person (‘RR’) who had, in turn, made that information public by disclosing it at a press conference. The respondents’ suit was premised on PBB’s breach of statutory duty under s 97(1) of the Banking and Financial Institutions Act 1989 (‘the BAFIA’) as well as breach of its implied contractual duty to not disclose confidential information relating to the respondents’ accounts with the bank to unauthorised persons. The respondents had sought RM RM560m in damages from PBB for the breach. The High Court held that PBB was not liable and dismissed the suit. The decision was reversed by the Court of Appeal (‘COA’) which found that PBB was liable to the first, second, third and fifth respondents (‘the respondents’) but awarded them only RM10,000 as nominal damages on the ground that they had not proven their loss. PBB’s appeal herein was against the COA’s finding of liability whilst the respondents’ appeal was against the award of nominal damages. The judgment herein only concerned PBB’s appeal. The appeal against damages was adjourned to a later date for hearing. In its appeal, PBB relied upon the landmark common law case of *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 (‘Tournier’) to argue that the court should not find PBB itself liable but only its two ‘rogue’ staff who had, without PBB’s knowledge, acted outside the scope of their authority by disclosing the respondents’ confidential banking information to RR. The

A respondents counter-argued that no such exception could apply as PBB's breach of its duty of confidentiality/secretcy was governed by the relevant provisions under BAFIA.

Held, unanimously dismissing the appeal:

- B (1) PBB was liable for breach of banking secrecy under s 97(1) of the BAFIA. It made no sense to say that a bank whose duty of secrecy was regulated by statute should be absolved of liability where the breach of that duty was committed by those under its employment, supervision and care.
- C It might be hard on the bank to be burdened with such responsibility, but to allow it to avoid liability by shifting the blame onto its employees was to defeat the object behind s 97(1) of the BAFIA and render the provision redundant and bereft of all meaning (see para 24).
- D (2) Neither ss 97(2) nor 99(1) of the BAFIA, which were exceptions to a bank's duty of secrecy, applied in favour of PBB and neither of those provisions was pleaded in its defence. It must therefore be taken that the breach by PBB of s 97(1) was without justification (see paras 26–27).
- E (3) In the light of s 3(1) of the Civil Law Act 1956 ('the CLA'), since there already was written law in Malaysia — in the form of s 97(1) of the BAFIA — on a bank's duty of secrecy after the coming into force of the CLA, the common law of England on such duty of the bank as administered in England on 7 April 1956 had no application. Therefore,
- F *Tournier*, being the common law of England on banking secrecy as administered prior to the coming into force of the CLA, had no relevance in determining whether or not PBB was liable for breaching its duty of secrecy to the respondents. *Tournier* was decided in 1924, some 30 years before the cut-off date of 7 April 1956. On that score alone, PBB's appeal, based as it was on the principles enunciated in *Tournier*, failed (see
- G paras 33 & 35).

[Bahasa Malaysia summary]

- Responden dalam rayuan pertama di sini telah menyaman Public Bank Bhd ('PBB') di Mahkamah Tinggi kerana mendedahkan maklumat sulit mengenai perniagaan mereka dengan bank kepada orang yang tidak diberikuasa ('RR') secara salah dan seterusnya telah mendedahkan maklumat itu kepada umum pada sidang akhbar. Saman responden-responden adalah berdasarkan pelanggaran kewajipan statutori PBB menurut s 97(1) Akta Bank dan Institusi-Institusi Kewangan 1989 ('ABIK') serta pelanggaran kewajipan perjanjian tersiratnya untuk tidak mendedahkan maklumat sulit yang berkaitan akaun responden dengan bank kepada orang yang tidak diberi kuasa. Responden telah menuntut ganti rugi sebanyak RM560 juta daripada PBB atas pelanggaran tersebut. Mahkamah Tinggi memutuskan bahawa PBB tidak bertanggungjawab dan menolak saman tersebut. Keputusan itu telah
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dibatalkan oleh Mahkamah Rayuan ('MR') yang memutuskan bahawa PBB bertanggungjawab kepada responden pertama, kedua, ketiga dan kelima ('responden') tetapi hanya membenarkan sebanyak RM10,000 sebagai ganti rugi nominal atas alasan mereka tidak berjaya membuktikan kerugian mereka. Rayuan PBB di sini adalah terhadap penemuan liabiliti MR manakala rayuan responden adalah terhadap pemberian ganti rugi nominal. Penghakiman di sini hanya melibatkan rayuan PBB. Rayuan terhadap ganti rugi telah ditangguhkan ke tarikh kemudian untuk perbicaraan. Dalam rayuannya, PBB bergantung pada kes common law *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 ('Tournier') dengan menghujahkan bahawa mahkamah tidak sepatutnya memutuskan bahawa PBB bertanggungjawab tetapi dua kakitangan yang 'jahat' yang sebenarnya bertanggungjawab kerana tanpa pengetahuan PBB, mereka bertindak di luar skop kuasa dengan mendedahkan maklumat perbankan sulit responden kepada RR. Responden membalas dengan menghujahkan bahawa tiada pengecualian sedemikian kerana PBB telah melanggar kewajipan kerahsiaannya yang diperuntukkan di dalam ABIK.

Diputuskan, sebulat suara menolak rayuan:

- (1) PBB bertanggungjawab atas pelanggaran kerahsiaan perbankan di bawah s 97(1) ABIK. Tidak masuk akal untuk menyatakan bahawa bank yang mempunyai kewajipan kerahsiaannya yang dikawal oleh undang-undang harus bebas dari liabiliti di mana pelanggaran kewajipan itu dilakukan oleh mereka yang berada di bawah pekerjaan, pengawasan dan penjagaannya. Mungkin sukar bagi bank untuk diberi tanggungjawab sedemikian, tetapi untuk membenarkannya mengelakkan liabiliti dengan mengalihkan kesalahan kepada pekerjaanya adalah bercanggah dengan tujuan s 97 (1) ABIK dan menjadikan peruntukan itu sia-sia dan tersasar dari tujuannya (lihat perenggan 24).
- (2) Seksyen 97(2) atau s 99(1) ABIK yang merupakan pengecualian kepada kewajipan kerahsiaan bank, tidak terpakai kepada PBB dan kedua-dua peruntukan tersebut tidak dihidkan di dalam pembelaannya. Oleh itu, tiada justifikasi diberikan untuk pelanggaran PBB terhadap s 97(1) (lihat perenggan 26–27).
- (3) Berdasarkan s 3(1) Akta Undang-Undang Sivil 1956 ('AUUS'), memandangkan terdapat undang-undang bertulis di Malaysia — menurut s 97(1) ABIK — mengenai kewajipan kerahsiaan bank selepas berkuatkuasanya AUUS, common law England mengenai kewajipan bank seperti yang ditadbir di England pada 7 April 1956 tidak terpakai. Oleh itu, kes *Tournier*, sebagai common law England mengenai kerahsiaan perbankan seperti yang diguna pakai sebelum AUUS berkuat kuasa, tidak boleh menentukan sama ada PBB bertanggungjawab atas pelanggaran kewajipan kerahsiaannya kepada responden. Kes *Tournier*

A telah diputuskan pada tahun 1924, kira-kira 30 tahun sebelum tarikh akhir 7 April 1956. Atas alasan ini sahaja, rayuan PBB berdasarkan prinsip-prinsip yang dinyatakan dalam kes *Tournier* tidak boleh dipertahankan (lihat perenggan 33 & 35).]

B Cases referred to

CIMB Islamic Bank Berhad v Mohd Saufi bin Taib [2015] MLJU 1022, CA (refd)

Greaves & Co (Contractors) Ltd v Baynham Meikle and Partners [1975] 3 All ER 99, CA (refd)

C *Hilton v Westminster Bank Ltd* [1926] 135 LT 358, CA (refd)

Liverpool City Council v Irwin and another [1977] AC 239, HL (refd)

Ng Lee Kiau (seorang peguambela dan peguamcara dan mengamal/berniaga sebagai rakan perkongsian di bawah gaya dan nama E Ramasamy & Co) & Anor v Malayan Banking Bhd [2011] MLJU 562, HC (refd)

D *Philipp v Barclays Bank UK plc* [2023] 4 All ER 847, SC (refd)

Platform Funding Ltd v Bank of Scotland plc (formerly Halifax plc) [2009] QB 426, CA (refd)

National Feedlot Corp Sdn Bhd & Ors v Public Bank Bhd [2024] 6 MLJ 326; [2023] 10 CLJ 430, CA (refd)

E *Robertson v Canadian Imperial Bank of Commerce* [1995] 1 All ER 824, PC (refd)

Selangor United Rubber Estates v Cradock (a bankrupt) and Others (No 3) [1968] 2 All ER 1073; [1968] 1 WLR 1555, Ch D (refd)

Stanford Asset Holdings Ltd and another v AfrAsia Bank Ltd (Mauritius) [2023]

F All ER (D) 64 (Oct), PC (refd)

Tan Eng Seong v Malayan Banking Bhd [1997] MLJU 36; [1997] 2 CLJ Supp 552, HC (refd)

Tey Por Yee & Anor v Protasco Bhd and other appeals [2021] 1 MLJ 76, CA (refd)

Tournier v National Provincial and Union Bank of England [1924] 1 KB 461, CA (not folld)

G *Tun Dr Mahathir bin Mohamad & Ors v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak* [2018] 3 MLJ 466; [2018] 4 CLJ 361, CA (refd)

Wong Yeng Mun v CIMB Bank Berhad [2010] MLJU 414; [2011] 1 CLJ 785, HC (refd)

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Legislation referred to

Banking Act 1973 (repealed by Banking and Financial Institutions Act 1989)

Banking and Financial Institutions Act 1989 (repealed by Financial Services Act 2013) ss 2, 97(1), (2), 98, 98(1), 99, 99(1), 99(1)(a), (1)(d),

I (1)(g), (1)(h)

Civil Law Act 1956 s 3(1)

Appeal from: *National Feedlot Corp Sdn Bhd & Ors v Public Bank Bhd* [2024] 6 MLJ 326 (Court of Appeal, Putrajaya)

Chan Kok Keong (with Tiang Min Min) (Shook Lin & Bok) for the appellant. Muhammad Shafee Abdullah (with Sarah Abisbegam, Farhan Mustaffa, Tharrence Anthony (Pupil in Chambers) and Suhail Shamsuddin (Pupil in Chambers)) (Shafee & Co) for the respondent.

A

Abdul Rahman Sebli CJ (Sabah and Sarawak):

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[1] There were two appeals before us. Appeal No 02(f)-14-05 of 2024(W) was an appeal by the appellant ('Public Bank') against the decision of the Court of Appeal allowing the respondents' appeal on liability whereas Appeal No 02(f)-15-05 of 2024(W) was an appeal by the respondents against the Court of Appeal's decision awarding them only nominal damages of RM10,000 despite having proved liability against Public Bank. They had claimed RM60m for general damages, RM250m for aggravated damages and RM250m for exemplary damages, totalling RM560m.

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[2] In reversing the decision of the High Court on liability, the Court of Appeal found Public Bank to be in breach of an implied term of contract imposing a duty of confidentiality not to disclose the respondents' banking information. As for the reason why the Court of Appeal awarded only nominal damages of RM10,000 to the respondents despite having found liability to have been proved against Public Bank, it was because the respondents were found to have failed to prove their loss. The learned judge of the High Court who tried the case at the first instance even suggested a token sum of RM15 as nominal damages had she allowed the respondents' claim, which she did not.

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[3] Having heard submissions on 26 February 2025, 16 April 2025 and 26 May 2025, we dismissed Public Bank's appeal on liability and adjourned the case to another date to hear arguments on damages. These are the grounds of our decision on liability.

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[4] The respondents' claim against the bank arose from a press conference held by one Rafizi bin Ramli ('Rafizi') on 7 March 2012. At the press conference Rafizi made statements concerning the respondents' confidential banking information and circulated them in the form of annexure A to E to his media statement.

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[5] The confidential banking document that Rafizi disclosed to the media was annexure E which referred to the fifth respondent's loan application with Public Bank for a loan facility to purchase eight units of condominium at KL Eco City. He highlighted and explained the details of annexure E, which is a management assessment document to enable Public Bank to assess and decide if the fifth respondent and his son were sufficiently eligible to obtain the loan facility from Public Bank.

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- A** [6] The fifth respondent's loan application was approved on 23 May 2011. However, after six months had lapsed, the loan offer was withdrawn by Public Bank on 4 January 2012 and the loan was terminated. Therefore, there was no loan taken by the fifth respondent, contrary to the allegation made by Rafizi in his press conference on 7 March 2012.
- B** [7] In finding Public Bank liable for breach of banking secrecy and confidentiality, the Court of Appeal made the following observations at paras [38] and [39] of its grounds of judgment:
- C** [38] Insofar as the contractual duty is concerned, there is no dispute that there is an implied term in the contractual relationship between the plaintiffs and the bank that information relating to the plaintiff's banking details (CP-BS) will remain confidential and will not be disclosed to unauthorised persons. This is trite and is plain commercial and common sense. This is because confidentiality is the cornerstone of all banking business. The confidentiality is necessary to give confidence to customers in entrusting their banking business to financial institutions.
- D**
- E** [39] Thus, pursuant to BAFIA ('the FSA') the bank as a financial institution owed a duty of secrecy over the customers' banking information. Indeed, if such a duty into a banking contract is implied, then that would be repugnant to the statutory protection of customers' banking information. Thus, the need to imply such a term is obvious, imperative and necessary.
- F** [8] The respondents' case against Public Bank was that in disclosing their confidential banking information, the bank had breached its: (a) statutory duty under the Banking and Financial Institutions Act 1989 ('the BAFIA'); (b) fiduciary duty; and (c) contractual duty.
- G** [9] In its defence Public Bank pleaded, amongst others, that two of its staff, namely one Cheam Chen Hooi and one Johari bin Mohamad working hands in glove had, without its authority, accessed and printed the respondents' confidential information from a restricted area of its computer system and for that reason it could not in law be held liable or responsible for the unauthorised and unforeseen acts of its staff.
- H** [10] It was submitted that the two 'rogue' employees of the bank had gone beyond the scope of their employment and were on a frolic of their own. In other words, it was the bank staff and not the bank itself that should be held responsible for breaching the bank's duty of secrecy and confidentiality to the respondents. Apparently the basis for this legal proposition is that the domestic inquiry that was conducted by Public Bank against the two bank staff had found both of them guilty.
- I**
- [11] On 29 July 2019, after a trial that lasted five years and heard before two

judges (the first having retired before the trial was concluded) the learned judge who took over the conduct of the trial dismissed the respondents' claim with costs of RM350,000 on the ground that the respondents failed to prove liability.

A

[12] On 30 August 2023, the Court of Appeal allowed the respondents' appeal in part by holding that Public Bank had breached its implied contractual duty of confidentiality owed to the first, second, third and fifth respondents. In its grounds of judgment, the Court of Appeal saw the case as 'one which turns on the question whether the bank had breached its implied contractual duty to maintain confidentiality over the plaintiffs' banking information'.

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[13] It was no doubt a decision that was grounded on the common law principle enunciated by the English Court of Appeal in *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 (*Tournier*) where it was, inter alia, held by Bankes LJ as follows:

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At the present day, I think it may be asserted with confidence that *the duty is a legal one arising out of contract*, and that the duty is not absolute but qualified. It is not possible to frame any exhaustive definition of the duty. The most that can be done is to classify the qualification, and to indicate its limits. (Emphasis added.)

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[14] The ratio decidendi of the case is that the bank's duty of secrecy and confidentiality arises out of contract and is not absolute but qualified. It laid down and defined the scope of a banker's duty of secrecy and confidentiality to its customers.

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[15] Arising from the decision of the Court of Appeal, two questions of law were posed by Public Bank for our determination and they were as follows:

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Question 1

Whether a bank's implied contractual duty of confidentiality is a qualified duty (as opposed to absolute duty) in that there are defences or exceptions to such a duty.

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Question 2

Where a bank's implied contractual duty of confidentiality is a qualified duty, whether a bank's liability thereunder, in a banker-customer contract of service, is a fault-based liability (as opposed to a strict liability).

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[16] Question 1 seeks to persuade this court to adopt *Tournier*, the case that formulated the scope of a banker's implied duty of secrecy and confidentiality and laying down four exceptions to such duty. Question 2 is a follow up and corollary to question 1.

A [17] The four exceptions to the bank's duty of secrecy and confidentiality that *Tournier* laid down are as follows:

(a) where disclosure is under compulsion of law;

B (b) where there is a duty to the public to disclose;

(c) where the interest of the bank requires disclosure; and

(d) where the disclosure is made by express or implied consent of the customer.

C [18] *Tournier* was a landmark decision which has been accepted as the correct position of the law on banking secrecy and confidentiality in the following Commonwealth jurisdictions: United Kingdom — See *The Law and Practice of Banking Volume 2: Securities for Bankers' Advances*, (7th Ed), J Milnes Holden, ELBS at para 2–100; the Privy Council case of *Robertson v Canadian Imperial Bank of Commerce* [1995] 1 All ER 824; the Privy Council case of *Stanford Asset Holdings Ltd and another v AfrAsia Bank Ltd (Mauritius)* [2023] All ER (D) 64 (Oct); the Australian position as can be seen in *The Law Relating to Banker and Customer in Australia* by GA Weaver and CR Craige, The Law Book Company Ltd, 1975 at para 5–6; *Banking Law and the Financial System in Australia*, (5th Ed), WS Weerasooria, Butterworths, Australia, 1000 at para 27.4. In New Zealand see *Introduction to New Zealand Banking Law* by Mark Russell, (2nd Ed), The Law Book Company Ltd 1991 at p 58. In India see *The Banking Law in Theory and Practice*, (3rd Ed), SN Gupta, Volume 1, Universal Law Publishing Co Pvt Ltd at p 246.

F [19] In Malaysia, the principle has yet to be affirmed and formally adopted by this court. It has however been accepted by the High Court and the Court of Appeal in the following cases: *Tan Eng Seong v Malayan Banking Bhd* [1997] MLJU 36; [1997] 2 CLJ Supp 552 (High Court); *Wong Yeng Mun v CIMB Bank Berhad* [2010] MLJU 414; [2011] 1 CLJ 785 (High Court); *Ng Lee Kiau (seorang peguambela dan peguamcara dan mengamal/berniaga sebagai rakan perkongsian di bawah gaya dan nama E Ramasamy & Co) & Anor v Malayan Banking Bhd* [2011] MLJU 562 (High Court); *Tey Por Yee & Anor v Protasco Bhd and other appeals* [2021] 1 MLJ 76 (Court of Appeal); and in the present appeal case as reported in *National Feedlot Corp Sdn Bhd & Ors v Public Bank Bhd* [2024] 6 MLJ 326; [2023] 10 CLJ 430; [2023] 10 CLJ 430 where Nantha Balan JCA speaking for the Court of Appeal said at para [27]:

I [27] At p 471, the legal position at common law was clearly established that there is 'no absolute contract' that the customers confidential information will never be disclosed under any circumstances. In this regard, Bankes LJ made the following legal propositions:

I hold, as a matter of law, that there is no such absolute contract as Sir Harold Smith has contended for between a banker and his customer. He has contended

that there is an absolute contract that the banker shall not under any circumstances disclose the state of a customer's account to any person. I hold, as a matter of law, that there is no such absolute contract.

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...

At the present day, I think it may be asserted with confidence that the duty is a legal one arising out of contract, and that the duty is not absolute but qualified.

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[20] At the hearing before us, learned counsel for Public Bank candidly admitted that none of the exceptions laid down in *Tournier* apply in Public Bank's favour. What he then urged upon us was to open up *Tournier* to a new exception, which is a fault-based exception instead of the duty of secrecy and confidentiality being a strict liability duty. Simply put, the contention was that no liability ought to be attached to the bank if the breach of the bank's duty of secrecy and confidentiality was not committed by the bank but by others within the establishment without its knowledge.

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[21] On his part learned counsel for the respondents submitted that in the Malaysian context, the scope of the banker's duty of secrecy is, in addition to the general principles enunciated in *Tournier*, provided in the BAFIA which replaced the Banking Act 1973. It was submitted that the appellant had breached the law across all manner of confidentiality, contractual, fiduciary and statutory duties. On the bank's duty of secrecy, we were referred to s 97(1) of the BAFIA which provides as follows:

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Secrecy.

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(1) No director or officer of any licensed institution, or of any external bureau established, or any agent appointed, by the licensed institution to undertake any part of its business whether during his tenure of office, or during his employment, or thereafter, and no person who for any reason, has by any means access to any record, book register, correspondence, or other document whatsoever, or material, relating to the affairs or, in particular, the account, of any particular customer of the institution, shall give, produce, divulge, reveal, publish or otherwise disclose, to any person, or make a record for any person, of any information or document whatsoever relating to the affairs or account of such customer.

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[22] It can thus be seen that in Malaysia the bank's duty of secrecy is regulated by statute and not an implied contractual duty as in the case of common law under the *Tournier* principle. Learned counsel for Public Bank however argued that the provision does not apply to the bank. It was submitted that the provision is only directed at the bank's director or officer and not at the bank as a financial institution.

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[23] In refuting the argument, learned counsel for the respondents submitted that the word 'person' in the second part of the section includes the

- A bank and not just its directors or officers. The argument was that Public Bank being a ‘corporation’ and therefore a ‘person’ within the meaning of s 2 of the BAFIA, it can be held liable under s 97(1) of the Act for a breach of banking secrecy.
- B [24] I agree because it makes no sense that a bank whose duty of secrecy is regulated by statute should be absolved of liability where the breach of that duty is committed by those under its employment, supervision and care. It may be hard on the bank to be burdened with such responsibility but to allow it to avoid liability by shifting the blame on its employees is to defeat the object behind s 97(1) of the BAFIA rather than to put its object into effect. That will render the provision redundant and bereft of all meaning.
- C
- D [25] It needs to be appreciated that it is the second part and not the first part of s 97(1) that imposes the duty of secrecy on the bank. What the first part provides is to prohibit a director, officer, external bureau, or agent appointed by the bank from undertaking, at any time, any part of the bank’s business. It has nothing to do with the bank’s duty of secrecy. Therefore, the argument that the bank’s duty of secrecy under s 97(1) is not directed at the bank but at its director or officer is misconceived.
- E
- F [26] BAFIA it will be noted not only provides for the bank’s duty of secrecy. It also provides for exceptions to the duty and these exceptions are found in ss 97(2), 98(1) and 99(1). While s 98 applies only to the central bank, ss 97(2) and 99(1) are meant to absolve licensed financial institutions from liability provided they satisfy the strict criteria therein. The three subsections are reproduced below:
- G Section 97(2)
- H (2) This section shall not apply to any information or document which at the time of the disclosure is, or has already been made, lawfully available to the public from any source other than the licensed institution, or to any information which is in the form of a summary or collection of information set out in such manner as does not enable information relating to any particular licensed institution or any particular customer of the licensed institution to be ascertained from it.
- I Section 98(1)
- Section 97 shall not apply to the disclosure of any information or document —
- (a) To the Bank, or to any director, officer or
- (b) employee of the Bank, or to any person
- (c) appointed by the Bank under subsection 3(3), or to the Advisory Panel, where the disclosure is for the purpose of the exercise of powers, the performance of functions or the discharge of duties of the Bank, or of the director, officer or employee of the Bank, or of the person appointed under subsection 3(3), or of the

- Advisory Panel; or (b) to any person rendering professional services to the Bank in relation to any matter of law, accountancy, valuation, or any other matter requiring professional knowledge, where he is authorised in writing by the Bank to obtain the information from the licensed institution for the purpose of his services to the Bank. **A**
- Section 99(1) **B**
- Section 97 shall not apply to the disclosure of any information or document —
- (a) Which the customer, or his personal representative, has given permission in writing to disclose;
- (b) In a case where the customer is declared bankrupt, or, if the customer is a corporation, the corporation is being or has been wound up, in Malaysia or in any country, territory or place outside Malaysia; **C**
- (c) Where the information is required by a party to a bona fide commercial transaction, or to a prospective bona fide transaction, to which the customer is also a party, to assess the creditworthiness of the customer relating to such transaction, provided that the information required is of a general nature and does not enable the details of the customer's account or affairs to be ascertained; **D**
- (d) For the purposes of any criminal proceedings or in respect of any civil proceedings —
- (i) Between a licensed institution and its customer or its guarantor relating to the customer's transaction with the institution; or **E**
- (ii) Between the licensed institution and two or more parties making adverse claims to money in a customer's account where the licensed institution seeks relief by way of interpleader; **F**
- (e) Where the licensed institution has been served a garnishee order attaching moneys in the account of the customer;
- (f) To an external bureau established, or to an agent appointed, by the licensed institution with the prior written consent of the Bank;
- (g) Where such disclosure is required or authorised under any other provision of this Act; **G**
- (h) Where such disclosure is authorised under any Federal law to be made to a police officer investigating into any offence under such law and such disclosure to the police officer being, in any case, limited to the accounts and affairs of the person suspected of the offence; or **H**
- (i) Where such disclosure is authorised in writing by the Bank.
- [27]** By the terms of ss 97(2), 98(1) and 99(1) of BAFIA, it is patently clear that under Malaysian law, the exceptions to the bank's duty of secrecy are more precise and more elaborate than the four broad exceptions provided by *Tournier*. None of these statutory exceptions apply in favour of Public Bank and none was pleaded in its defence. It must therefore be taken that the breach of s 97(1) by the bank was without justification. **I**

A [28] Given the fact that there is written law in force in Malaysia on the bank's
duty of secrecy and the exceptions to the duty, we had on the second date of
hearing on 16 April 2025 invited parties to address us on the applicability of
B *Tournier*, an English common law position, in the light of s 3(1) of the Civil
Law Act 1956 ('the Civil Law Act') although not addressed by the parties both
in their written and oral submissions.

C [29] With s 3(1) of the Civil Law Act staring us in the eyes, it would not have
been proper for us to close one eye to the statutory provision just because it was
not brought to our attention. It is our duty as the apex court to uphold the law.
This is especially necessary in view of Public Bank's heavy reliance on *Tournier*
(and the cases that followed it) to avoid liability and its proposal to open up a
new exception to the four already set out in the case as encapsulated in leave
question 2.

D [30] If indeed *Tournier* has no application in the light of s 97(1) of
the BAFIA read with s 3(1) of the Civil Law Act, then it will not be open to
Public Bank to rely on the four common law exceptions or on any new
common law exception outside the scope of ss 97(2) and 99(1) of the BAFIA
E to avoid liability. It is a cardinal principle of legislative interpretation that
Parliament does not legislate in vain. It would have inserted in s 99(1) the
fault-based exception as suggested by learned counsel for Public Bank if it had
such intention, but Parliament in its wisdom omitted to do so.

F [31] An example where the *Tournier* principle is incorporated into BAFIA is
sub-para (1)(a), and to some extent sub-paras (1)(d), (g) and (h) of s 99, which
allow for disclosure of confidential information or documents by the bank
under those limited circumstances. These are adoptions, albeit in different
terms, of exceptions 1, 2 and 4 of the bank's duty of secrecy and confidentiality
G under the *Tournier* principle.

H [32] It was with a view to clear our minds on this issue that half way through
the submissions on 16 April 2025, we adjourned the hearing to another date to
give ample time and opportunity to both counsel to provide us with written
submissions on the interplay between s 97(1) of the BAFIA and s 3(1) of the
Civil Law Act vis a vis the common law position as laid down in *Tournier*. They
had obligingly done so, for which we are thankful, and the matter was fully
argued on the third and last day of hearing on 26 May 2025.

I [33] Section 3(1) of the Civil Law Act provides as follows:

3 Application of UK common law, rules of equity and certain statutes

(1) Save so far as other provisions has been made or may hereafter be made by any
written law in force in Malaysia, the Court shall —

- (a) in Peninsular Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th of April 1956; A
- (b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 1 December 1951; B
- (c) in Sarawak, apply the common law of England and the rules of equity and statutes of general application, as administered or in force in England on 12 December 1949, subject however to subparagraph (3)(ii);

Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary. C

[34] I had occasion to deal with this provision in *Tun Dr Mahathir bin Mohamad & Ors v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak* [2018] 3 MLJ 466; [2018] 4 CLJ 361 where, in delivering the unanimous decision of the Court of Appeal, I had said at para [16]: D

[16] Common law refers to rules of law developed by judges as opposed to those created by statute. Section 3 of our Interpretation Acts 1948 and 1967 ('the Interpretation Acts') defines 'common law' to mean the common law of England. But it must not be assumed that every sphere of the common law of England is applicable in this country. Its applicability is governed by s 3(1) of the Civil Law Act 1956 ('the Civil Law Act') which provides as follows ... E

...

[17] What this provision means in its application to Peninsular Malaysia is that the common law of England as administered on 7 April 1956 is only to be applied where there is no written law in force in Malaysia after the coming into force of the Civil Law Act on 7 April 1956. F

[35] Since there is written law in Malaysia on the bank's duty of secrecy after the coming into force of the Civil Law Act on 7 April 1956, in this case s 97(1) of BAFIA, the common law of England on such duty of the bank as administered on 7 April 1956 has no application. Therefore, being the common law of England on banking secrecy as administered prior to the coming into force of the Civil Law Act, *Tournier* has no relevance in determining whether Public Bank is liable for breaching its duty of secrecy to the respondents. The case was decided in 1924, some 30 years before the cut off date of 7 April 1956. On this score alone Public Bank's appeal, based as it was on the *Tournier* principle, must fail. G

[36] With regard to the fault-based exception, the argument of learned counsel for Public Bank was that under a banker-customer contract of service, H

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- A a bank has a ‘Quincecare duty’ to carry out a customer’s instructions with reasonable care and skill. Like *Tournier*, the ‘Quincecare duty’ is also a common law concept that was expounded in *Hilton v Westminster Bank Ltd* [1926] 135 LT 358 and which culminated in the recent Supreme Court case of *Philipp v Barclays Bank UK plc* [2023] 4 All ER 847 where it was held at p 34:
- B [34] As for any contract for the supply of services in the course of a business, there is a term implied by law in a contract between a bank and its customer that the bank must carry out the services with reasonable care and skill...
- C [37] The following authorities were also cited in support: *Carter’s Breach of Contract*, JW Carter (LexisNexis Butterworth, 2011, Australia) at para 2–65; *Liverpool City Council v Irwin and another* [1977] AC 239 (House of Lords); Trietel, *Law of Contract* (8th Ed, 1991), by GH Trietel at p 739; *Frustration and Force Majeure*, Third Ed, at p 5; *Greaves & Co (Contractors) Ltd v Baynham Meikle and Partners* [1975] 3 All ER 99; *Platform Funding Ltd v Bank of Scotland plc (formerly Halifax plc)* [2009] QB 426; *CIMB Islamic Bank Berhad v Mohd Saufi bin Taib* [2015] MLJU 1022.
- D
- E [38] *Westminster Bank* was followed in *Selangor United Rubber Estates v Cradock (a bankrupt) and Others (No 3)* [1968] 2 All ER 1073; [1968] 1 WLR 1555. On the strength of these common law authorities, it was submitted that Public Bank is only required to carry out its implied contractual duty of confidentiality with reasonable care and skill. It was submitted that so long as the bank has carried out its implied contractual duty of secrecy and confidentiality with reasonable care and skill, the bank cannot be faulted or be
- F held liable for breach of contract if the customer’s confidential information/documents were disclosed by its rogue employee or employees.
- G [39] Public Bank’s dissatisfaction with the decision of the Court of Appeal was in failing to hold that the bank’s implied contractual duty of confidentiality is a qualified duty, ie that Public Bank’s liability under such qualified duty, in a banker-customer contract of service, is a fault-based liability and not a strict liability. But the judgment of the Court of Appeal does not bear this out. Paragraph [27] of the grounds of judgment reproduced in para [19] above
- H clearly shows that the Court of Appeal proceeded on the basis that the duty is qualified and not strict.
- I [40] Of pertinence to note is that Public Bank accepted that the two individuals responsible for breaching its duty of secrecy which led to the press conference by Rafizi were its employees. With due respect to learned counsel, the distinction that he drew between qualified duty and strict liability is illusory at best, because if the bank’s duty of secrecy is a qualified duty, it means that liability is not strict. Strict liability means there is no qualification or exception to the duty. The availability of the four exceptions in *Tournier* itself as defences

to a breach of the duty of secrecy and confidentiality renders the argument wholly untenable. In any event it is BAFIA that governs the bank's duty of secrecy and not the common law principles propounded in *Tournier* and *Barclays Bank*.

[41] It was for all the reasons aforesaid that we found no merit in Public Bank's appeal, hence the decision to dismiss the appeal with costs to the respondents. We saw no necessity to answer the two leave questions posed as they were predicated on the common law of England which has no application in the light of s 3(1) of the Civil Law Act. My learned sister Justice Hasnah Mohammed Hashim, Chief Judge of Malaya and my learned brother Federal Court Judge Justice Abu Bakar Jais have seen this judgment in draft and have agreed with it.

Appeal dismissed unanimously.

Reported by Ashok Kumar

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